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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1415

THE BOARD OF EDUCATION OF THE KANKAKEE SCHOOL DISTRICT NO. 111, A SPECIAL CHARTER DISTRICT, COUNTY OF KANKAKEE, STATE OF ILLINOIS,

Respondent,

vs.

KANKAKEE FEDERATION OF TEACHERS LOCAL NO. 886, HERBERT WHITE, LILLIE FORD AND PHILLIP RILEY, AS OFFICERS AND REPRESENTATIVES OF THE KANKAKEE FEDERATION OF TEACHERS LOCAL 886 AND HERBERT WHITE, LILLIE FORD, PHILLIP RILEY, JOHN KENNEDY, WILLIAM STEWARD, SR., STEVE BRECKON AND JAMES ROBINSON, INDIVIDUALLY,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioners, Kankakee Federation of Teachers, Local No. 886, Herbert White, Lillie Ford and Phillip Riley as officers and representatives of the Kankakee Federation of Teachers Local No. 886 and Herbert White, Lillie Ford, Phillip Riley, John Kennedy, William Steward Sr., Steve Breckon

and James Robinson, individually respectfully request that this court issue a writ of certiorari to the Supreme Court of Illinois to review the opinion and judgment of that Court entered on September 22, 1970, rehearing of which was denied on December 3, 1970.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported at 46 Ill. 2d 433, 264 N. E. 2d 18.

JURISDICTION.

This case began in the Circuit Court of Kankakee County on Saturday, April 26, 1969 when the plaintiff Board of Education filed suit for a temporary injunction to restrain a strike and picketing by defendant teachers and their union. The Court without notice to defendants issued an *ex parte* temporary restraining order on that date. The defendants were charged on April 29, 1969 with violation of the order. The defendants moved to dismiss the charges on the grounds that:

> "Said temporary injunction was issued without any valid excuse for the failure to give notice to defendants and was thereby in violation of the due process clause of the 14th Amendment to the Constitution of the United States."

The motion was overruled. After trial defendants were found guilty of contempt with fines and jail sentences being assessed. The trial court entered its judgment order on May 23, 1969 and appeal was thereupon immediately taken to the Supreme Court of Illinois under Illinois Supreme Court Rule 302 which provides:

> "Appeals from final judgments of Circuit Courts shall be taken directly to the Supreme Court: . . . (b) in cases involving a question arising under the Constitution of the United States or of this State."

The Supreme Court of Illinois affirmed on September 22, 1970. Appellants petitioned for rehearing on October 15, 1970. The petition for rehearing was denied on December 3, 1970.

The jurisdiction of this court to review this decision is conferred by Title 28 United States Code, Section 1257(3).

QUESTION PRESENTED.

Does a court, consistent with the Due Process Clause of the Fourteenth Amendment to the Constitution, have jurisdiction to issue an order restraining a strike and picketing by public school teachers when the defendants have not been notified of the proceedings and no effort is made by anyone to notify the defendants even though the defendants can easily be given notice of the proceedings?

CONSTITUTIONAL PROVISIONS AND STATUTES.

United States Constitution.

Amendment XIV.

Secion 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Revised Statutes.

Chapter 69.

Section 3. No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party unless it clearly appears, from specific facts shown by the verified complaint or by affidavit accompanying the same, that im-

mediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.

SECTION 3-1. Temporary Restraining Order; Notice; Hearing; Duration: No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail,

and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwis..

STATEMENT OF THE CASE.

In April, 1969 the Board of Education of Kankakee School District 111 operated a public elementary and high school system. The district employed some 375 teachers. The Kankakee Federation of Teachers was a union whose members were teachers in the district. The union was the exclusive representative of all the teachers for purposes of collective bargaining. The eight individual defendants were officers or members of the union negotiating team.

On Thursday evening, April 24, 1969, the union teachers voted to strike against the plaintiff Board of Education. The union sent a telegram to the president of the board who received it by telephone at about 12:30 a.m. on the morning of April 25. The board president called the union president at about 1:00 a.m. after receiving the message. There were no further contacts between the board and the union or any representatives of the union during April 25 or April 26.

On Friday morning, April 25, the majority of the teachers were on strike and many carried signs in front of the schools acknowledging this fact. On April 25, the board attorney drafted a complaint for injunction. On Saturday, April 26 the board met and authorizd injunction proceedings. In the late afternoon of April 26, the attorney for the board sought an injunction asking for the following relief:

> "Wherefore, Plaintiff moves this Court to enter a temporary injunction without notice and without bond,

> restraining Defendants and all persons in active concert and participation with them, and each of them, from participating in, or causing, inducing or encouraging, any strike or other concerted withholding of services, or interference with the performance of any service, by an employee of Plaintiff, or from picketing, parading or patrolling at, or in, the vicinity of the schools campuses maintained and operated by plaintiff for the purpose of inducing such strike or other concerted withholding of services."

The complaint asked for no relief beyond a temporary injunction. No notice was given to any of the defendants nor was any effort made to give defendants notice of the injunction proceedings.

At 5:45 p.m., a temporary restraining order was issued granting the relief substantially in the language prayed for by the plaintiff.

By 8:30 p.m. the sheriff had served the temporary restraining order on 7 of the 8 individual defendants and was advised by the wife of the 8th person that he would return on Sunday. That teacher was served on Sunday.

On Monday, April 28, schools remained closed. Teachers apparently continued to strike and picketing continued. On April 29, plaintiff filed a petition for rule to show cause and a rule to show cause was issued. Contempt proceedings began on May 5, 1969.

At the outset of the contempt proceedings defendants challenged the April 26th injunction by written motion as follows:

> "1. On or about April 26, 1969 this court entered a temporary injunction which forms the basis of these proceedings. Said temporary injunction was issued without notice and without any valid excuse for the failure to give notice to defendants and was thereby in violation of the due process clause of the 15th Amendment to the Constitution of the United States."

The motion was denied and a hearing on the contempt charges proceeded at the close of the hearing the court found the union and the eight individuals guilty and imposed a fine of $12,000 against the union and fines and jail sentences of varying degrees against the individuals.

The question of defendants' right to notice before the issuance of the temporary restraining order was the first point in their argument before the Supreme Court of Illinois. As its opinion indicates the Supreme Court of Illinois ruled against defendants on this point.

THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

In *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175, 89 S. Ct. 347 (1968) this Court held that the issuance of a temporary restraining order which affects First Amendment rights without any prior attempt to notify readily available defendants involved a substantial federal question. This Court not only found a substantial federal question, it ruled that such a restraining order could not be sustained.

The case at bar involves the issuance of a temporary restraining order under similar circumstances against striking and picketing. Whether or not strikes come within the ambit of constitutional protection, this court has ruled on numerous occasions that picketing, whether lawful or unlawful and subject to restraint, involves First Amendment conduct. *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736 (1940), *A. F. L.* v. *Swing,* 312 U. S. 321, 61 S. Ct. 568 (1941), *I. B. T.* v. *Vogt,* 354 U. S. 284, 77 S. Ct. 116 (1957).

As in *Carroll* the instant restraining order was issued without notice to readily available defendants. The Illinois Supreme Court noted the facts regarding notice:

> "No prior notice was given defendants, nor was there an attempt to do so, and, at 5:45 P.M. a temporary restraining order was entered granting the relief prayed. By 8:30 P.M. of the same day, Saturday April 26, the sheriff had served the temporary restraining order on all but one of defendants, and he was served the following day."

The instant case also brings to the surface another element which is often present but rarely articulated in injunction cases. Most plaintiffs request various forms of temporary and permanent relief. However, in the knowledge that temporary relief will achieve their goal they often only desire a temporary restraining order. In the instant case there is no pretense that any more than temporary relief was desired. Plaintiff limited its complaint to a request for temporary relief and did not make even a routine request for "such other relief as the court may deem just." Thus plaintiff obtained its total relief without a hearing and without giving notice to the readily available defendants.

The concept of notice is deeply imbedded in our constitutional tradition, as this Court said in *Simon* v. *Craft*, 182 U. S. 427, 436, 21 S. Ct. 836, 837 (1901):

> "The essential elements of due process of law are notice and opportunity to defend."

Likewise in *Grannis* v. *Ordean*, 234 U. S. 385, 394, 34 S. Ct. 779, 783 (1914) this Court said:

> "The fundamental requisite of due process of law is the opportunity to be heard."

Or as this Court stated in *Roller* v. *Holly*, 176 U. S. 398, 409, 20 S. Ct. 410, 414 (1900):

> "That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight. . . ."

This court has often reversed judgments because a reasonable effort was not made to notify defendants: *Mullane* v. *Central Hanover Bank,* 339 U. S. 306, 70 S. Ct. 652 (1950), *Schroeder* v. *City of New York,* 371 U. S. 208, 83 S. Ct. 279 (1962) and *Walker* v. *Hutchinson City,* 352 U. S. 112, 77 S. Ct. 200 (1956).

This court has noted that the notice of proceedings must be at a meaningful time. *Armstrong* v. *Manzo,* 380 U. S. 552, 85 S. Ct. 1187 (1965), *Griffin* v. *Griffin,* 327 U. S. 220, 66 S. Ct. 556 (1946), *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 89 S. Ct. 1820 (1969).

It was in the context of such a tradition that this court made its decision in *Carroll.* The instant case is a sequel to *Carroll.* It poses the question as to the legal standing of an order issued in violation of the principles of *Carroll.* Does the failure to give notice render that order void and therefore subject to being ignored or should *Walker* v. *City of Birmingham,* 388 U. S. 307, 87 S. Ct. 1824 (1967) be extended so as to require defendants to obey the order pending further proceedings?

Carroll lends considerable support to the proposition that an order issued in violation of the principles of *Carroll* should be considered unenforceable. The right of a defendant to be involved in judicial proceedings at a meaningful time is far more substantial than his right to later complain about proceedings in which he was given an opportunity to take part. *Carroll* did not decide whether orders issued in violation of its principles are nevertheless enforceable or whether they are unenforceable.

Likewise, *Walker* and *Howat* v. *Kansas,* 258 U. S. 181, 42 S. Ct. 277 (1922) relied on by the Illinois Supreme Court only involved challenges to the substance and form of orders. They did not resolve the threshold question

of defendants being excluded from proceedings for no justifiable reason.

Thus, in terms of basic constitutional principles the instant case presents a substantial federal question. But this case has additional substance because it arises in the field of government employer-employee relations.

Not only has there been an expansion in the number of government employees but there has likewise been a marked increase in unionization, collective bargaining and strikes. *Government Employee Relations Report No. 350,* May 25, 1970 (reproducing a Report of the Bureau of Labor Statistics) traces the increase in government employee strikes from 26 in 1959 involving 2,240 workers to 254 in 1968 involving 201,800 workers.

The expansion of activity in the field has been attended by the same types of litigation that arose 50 years ago in the private sector. The no-notice injunction is no less a problem now than in the days that led up to the enactment of Norris-La Guardia and similar state statutes which were aimed at curbing the power of courts to issue any injunctions let alone the no-notice injunction in labor disputes.

William Gould in *1970 The Supreme Court Review* (U. of Chicago Press) p. 234 recalls the experience before 1932:

> "Labor experience with injunctions before 1932 was extremely bad. Among the abuses were frequent use of *ex parte* injunctions against strikes and picketing, issuance of injunctions on the basis of vague and generalized affidavits, and general unwillingness by the judiciary to reverse, at the permanent stage, a decision already made by a judge in issuing a temporary restraining order."

Mr. Justice Murphy in his dissent to *United States* v. *United Mine Workers,* 330 U. S. 258, 340, 67 S. Ct. 677, 719

(1947) not only traced this history but also pointed out the danger of a temporary restraining order in a labor dispute:

> "This absolute outlawry of restraining orders in cases involving private labor disputes is not without reason. The issuance of such orders prior to the adoption of the Norris-La Guardia Act had a long and tortured history. Time and again strikes were broken merely by the issuance of a temporary restraining order, purporting to maintain the status quo."

The foregoing comments underscore the importance of notice to defendants in cases which may be effectively decided at the temporary restraining order stage.

We hasten to point out that the issue before the court is not whether strikes by public employees are legal or not. Indeed there is considerable conflict on this point with a growing legal basis in support of such strikes. See *Board of Education* v. *Public School Employees Union,* 233 Minn. 144, 45 N. W. 2d 797 (1951), *City of Holland* v. *Holland Education Association,* 380 Mich. 314, 157 N. W. 2d 206 (1968), *Local 266, Etc.* v. *Salt River Project Agricultural Improvement and Power Dist.,* 78 Ariz. 30, 275 P. 2d 393 (1954). Even the Illinois Supreme Court has moved in this direction in *County of Peoria* v. *Benedict,* ..... Ill. ....., 265 N. E. 2d 141 (1970).

Governors' commissions in Maryland, Michigan and Pennsylvania recognize that strikes are not per se evil. (*See Government Employee Relations Reports* No. 189, 278 and Report and Recommendations of the Governor's Commission to Revise the Public Employee Law of Pennsylvania (June, 1968).) Hawaii, Vermont, Montana and Pennsylvania by statute specifically authorize certain public employee strikes (See Government Employee Relations Reports No. 356 (July 6, 1970) and No. 359 (July 27, 1970) and Laws of Vermont, 1969 pp. 324-330, Laws of Montana, 1969, pp. 778-782).

Even if the question of strikes and picketing by public employees were totally one-sided, it would be improper to assume that a defendant's presence would make no difference.

This Court noted this in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 35 S. Ct. 625 (1915):

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Earlier this Court noted that a lack of defense cannot be assumed:

> "To assume that he has none and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest." *Rees* v. *Watertown*, 19 Wall. 107, 123, 22 L. ed. 72, 77 (1874).

To ignore this principle in a public-employee labor dispute is not only to disregard due process but to disregard it in a highly volatile situation. The result more often than not is to exasperate the dispute rather than to resolve it. This case thus presents an opportunity to resolve an important question of due process. In addition it presents the opportunity to provide direction so that the "tortured history" of the labor injunction in the private field need not be repeated in the public sector.

CONCLUSION.

The question in this case is substantial. It is substantial because it involves an important question of due process, because it seeks to clarify decisions of this court and because it affects the conduct of labor relations in a substantial part of the economy.

We ask that a petition for writ of certiorari issue to review the decision of the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A.

Opinion of the Illinois Supreme Court.

THE BOARD OF EDUCATION OF THE KANKAKEE SCHOOL DISTRICT No. 111, Appellee, *vs.* KANKAKEE FEDERATION OF TEACHERS LOCAL No. 886 *et al.*, Appellants.

Mr. JUSTICE CULBERTSON delivered the opinion of the court:

Defendants, who are a teachers' union, and certain of its officers and members, were convicted of criminal contempt for wilfully failing to comply with a temporary restraining order issued against them by the circuit court of Kankakee County. A fine of $12,000 was levied on the union while lesser fines, and in some instances jail sentences of 60 days, were meted out against the individual defendants. They have appealed, raising constitutional questions which serve to invest us with jurisdiction to entertain a direct appeal.

During the month of April, 1969, the Kankakee Federation of Teachers Local No. 886 and the Board of Education of Kankakee School District No. 111 were engaged in contract negotiations. After ineffectual meetings and correspondence, which nonetheless left the door open for further negotiations, the union dispatched a telegram to the Board president on April 25, shortly after midnight, advising him that the membership had voted "to withhold teaching services beginning Friday, April 25, 1969, until satisfactory agreements on a new contract and other matters are reached." Later in the morning, when the time for school to start arrived, the majority of the teachers were on strike and many of them picketed at the schools. As a consequence, all but one of the Board's fifteen schools were unable to operate. It may be stated at this time that such a

strike by school employees was unlawful as being in violation of the expressed public policy of this State. See: *Board of Education of Community Unit School District No. 2* v. *Redding* (1965), 32 Ill. 2d 567.

Because of the statute requiring a 24-hour public notice to be given prior to a special meeting, (Ill. Rev. Stat. 1967, ch. 102, par. 42.02,) the Board could take no official action until Saturday, April 26. A meeting was held the latter date and after its conclusion in late afternoon, an attorney for the Board presented a complaint to a judge of the circuit court, properly supported by affidavit, praying for a temporary injunction, without notice or bond, restraining defendants from striking and picketing, and from inducing or encouraging others to do so. (See: Ill. Rev. Stat. 1967, ch. 69, par. 3—1). In substance, and patterned to a degree after the decision in *Redding*, the complaint alleged that the strike was in violation of the declared public policy of this State and therefore unlawful; that it had interrupted the operation of schools causing immediate and irreparable damage to the public; and that it prevented the Board from fulfilling its constitutional duty to provide the district with a thorough and efficient system of free schools. No prior notice was given defendants, nor was there an attempt to do so, and, at 5:45 P.M. a temporary restraining order was entered granting the relief prayed. By 8:30 P.M. of the same day, Saturday, April 26, the sheriff had served the temporary restraining order on all but one of defendants, and he was served the following day.

On Monday, April 28, the teachers continued to strike and picket. No effort was made by defendants to vacate or dissolve the restraining order, or to otherwise seek judicial relief with respect thereto. On the same day the Board filed a motion for a preliminary injunction in accordance with sections 3 and 3—1 of the Injunction Act, (Ill. Rev. Stat.

1967, ch. 69, pars. 3 and 3—1,) which was set for hearing on Friday, May 2. Defendants appeared at the hearing but filed no pleadings, presented no evidence and in no manner sought to attack the legal basis for either the temporary order or the preliminary injunction. The latter injunction was issued but, as in the case of the temporary restraining order, defendants ignored it. As we interpret the record, the strike continued and the schools remained closed until May 12, the date upon which the trial court ruled on the evidence and found defendants in contempt.

Pursuant to a petition filed by the Board on April 29 an order entered on that date directed defendants to appear and to show cause why they should not be held in contempt and punished for disobeying the temporary restraining order. Hearing on the matter was held Monday, May 5, and on this occasion defendants filed a motion to dismiss the contempt proceedings. As grounds therefore it was alleged that the issuance of the temporary restraining order without notice or hearing deprived defendants of due process of law, and that both the petition for a rule to show cause and the order entered thereon were so vague, indefinite and uncertain as to violate the requirements of due process. The motion was denied and, after hearing evidence on both sides, the court found certain of the defendants in contempt and imposed fines and sentences as heretofore related. As to two of the individual defendants, however, the evidence was found to be insufficient to show that they had violated the restraining order and the rule to show cause was dismissed as to them. In this regard, the defendants appealing do not challenge the sufficiency of the evidence to support their convictions.

To obtain a reversal defendants rely principally on *Carroll* v. *President and Commissioners of Princess Anne* (1968), 393 U. S. 175, 21 L. Ed. 2d 325, 89 S. Ct. 347. In that case, during the day of August 7, 1966, officials of the

town of Princess Anne obtained an *ex parte* restraining order to prevent a public rally scheduled for that night by members of a "white supremacist" organization. Inflammatory speeches made at a similar rally the night before had created a tense atmosphere, and the order restrained the persons involved for 10 days from holding meetings or rallies in the county "which will tend to disturb and endanger the citizens of the county." The order was served on some of those affected by 6:10 P.M., (a circumstance which caused the court to conclude that notice of the application for the order could just as easily have been served,) and, in obedience thereto, the rally was cancelled. After a trial, an injunction was issued on August 31, 1966, which had the effect of extending the restraint for an additional 10 months. An appeal was prosecuted to a State court, and thereafter the United States Supreme Court entertained a petition which sought review of the 10-day order. Approaching the problem presented from the concept that "Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment" (393 U. S. at 181, 21 L. Ed. 2d at 331, 89 S. Ct. at 351,) the court found the restraining order to have been improper, stating: "The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued ex parte, without notice to petitioner and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." 393 U. S. at 180, 21 L. Ed. 2d at 330, 89 S. Ct. at 351.

Inasmuch as the order in the instant case restrained defendants from picketing, which defendants see as the precise legal equivalent of free speech, it is contended that the same basic infirmity in the procedure by which the order was obtained requires it to be set aside and the contempt convictions held for naught. But we believe it clear that *Carroll* is inapposite, and of no persuasion here.

We are not dealing with a prior restraint, nor was the trial court, when asked to issue the temporary restraining order, confronted with a constitutionally protected area of free speech. Picketing, while a mode of communicating ideas, is not dogmatically equated with constitutionally protected speech, (*Hughes* v. *Superior Court of California,* 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718; *International Brotherhood of Teamsters, Local No. 309* v. *Hanke,* 339 U. S. 470, 94 L. Ed. 995, 70 S. Ct. 773,) and it is settled that the first and fourteenth amendments do not afford the same kind of freedom to those who communicate ideas by picketing, as they afford to those who communicate ideas by pure speech. (*Cox* v. *Louisiana,* 379 U. S. 536, 13 L. Ed. 2d 471, 85 S. Ct. 453.) And as we said in the *Redding* case, on the basis of both Federal and State precedent, "* * * it is more than clear that a State may, without abridging the right of free speech, restrain picketing where * * * the picketing is for a purpose unlawful under State laws or policies, whether such policies have been expressed by the judicial organ or the legislature of the State." (32 Ill. 2d at 574.) Here, the unlawful strike of the teachers was already in progress when the temporary order was sought, and the picketing the Board was seeking to restrain was being carried on for the purpose of fostering and supporting such unlawful strike. Accordingly, the first amendment considerations which controlled in *Carroll* were not present in this case. And there is another factual distinction worthy of note. Those against whom the order was directed in

Carroll obeyed it and then judicially challenged its validity, the latter issue carrying over into the appeals; in the case at hand defendants deliberately defied the court by ignoring and disobeying its order instead of seeking judicial relief from its consequences, and the single issue on appeal is whether defendants could properly be found in contempt for their disobedience.

More in keeping with the circumstances of this case are the teachings of *Howat* v. *Kansas,* 258 U. S. 181, 66 L. Ed. 550, 42 S. Ct. 277, and its progeny, one of the latest of which is *Walker* v. *City of Birmingham,* 388 U. S. 307, 18 L. Ed. 2d 1210, 87 S. Ct. 1824. (See also: *United States* v. *United Mine Workers,* 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677; *O'Brien* v. *People ex rel. Kellogg Switchboard and Supply Co.,* 216 Ill. 354; *Fansteel Metallurgical Corp.* v. *Lodge 66, etc.,* 295 Ill. App. 323, *cert.* denied 306 U. S. 642.) The simple and logical rationale of these decisions is that where a court of equity issues an injunction, with jurisdiction of the subject matter and the persons and upon pleadings properly invoking its action, the injunction must be obeyed, however erroneous the action of the court may be, until it is reversed for error by orderly review, either by the court itself or a higher court. Disobedience of such an injunction is contempt of the lawful authority of the court, and punishable as such. (See: 388 U. S. at 314, 18 L. Ed. 2d at 1216, 87 S. Ct. at 1828.) We agree with the trial court that the principle of these cases is controlling here, and while we do not believe the temporary restraining order was erroneous, that issue is not before us. *Cf. Walker* v. *City of Birmingham,* 279 Ala. 53, 181 So. 2d 493.

Unquestionably the court below had the necessary jurisdiction. Section 1 of the Injunction Act provides that our circuit courts shall have the power to grant writs of injunction, and by the provision of section 3—1 they are author-

ized to grant temporary restraining orders, without notice, where it "clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." (Ill. Rev. Stat. 1967, ch. 69, pars. 1 and 3—1.) Noteworthy also, in light of defendants' choice to ignore the order, is the further language of section 3—1 which states: "On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require." Nor, since defendants failed to attack it, can there be any question here of the sufficiency of the complaint to justify the issuance without notice. (See: *Miollis* v. *Schneider,* 77 Ill. App. 2d 420.) Under the circumstances, we hold that the circuit court had the authority and duty to issue the temporary restraining order, and that defendants' disobedience of such order, then outstanding and unreversed, merited their punishment for contempt.

Defendants next urge that the petition for rule to show cause and the order entered thereon are vague and uncertain, and insufficient to give them notice of the charges against them, the thrust of their argument being that both the petition and order should have spelled out names, dates, places and the specific conduct which constituted a violation of the order. Upon examination of the petition and the order which incorporates the petition, and bearing in mind that each of the defendants had been served with the restraining order so as to be aware of the prohibited conduct, we find no merit to this contention. In essence, defendants are contending that the evidence against them should have

been pleaded. But it is a rule of pleading long established, that a pleader is not required to set out his evidence. To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts. (*Levinson* v. *Home Bank and Trust Co.*, 337 Ill. 241; *Sloan* v. *School Directors of Dist. No. 22*, 373 Ill. 511; *Burns* v. *Epstein*, 413 Ill. 476; 30 I. L. P., Pleading § 6.) Within this point of argument contention is also made that the contempt order is deficient because it failed to set forth the specific act or acts of defendants which brought them into contempt. But, manifestly, a judgment order need not recite the evidentiary facts upon which it is based. What is more, the contention of defendants that they do not know which of their acts caused them to be held in contempt is patently specious. Prior to the entry of the written order, the trial court here made oral findings of fact as to each of the defendants, which is a part of the record, leaving no doubt as to the contumacious acts for which they were to be punished. Significantly, we believe, no contention has been made on appeal that the evidence was insufficient to support the convictions.

During the course of the contempt hearing the court permitted a witness for the Board to testify, without objection by defendants, that one of the defendants had stated at a public meeting held May 3, 1969, that "no court nor anybody else could bulldoze the teachers into coming in the school room [*sic*]." Defendants now make the belated and fanciful claim that the admission and consideration of such evidence has the effect of inhibiting free speech, and also assert, as we interpret the vague argument advanced, that the contempt order may have punished the defendant in question for having exercised his right of free speech. We need look no further than the oral findings of the court to dispel the latter contention, for they clearly show that it was his actions, not his statements, upon which the court

based its conclusion that the defendant had wilfully disobeyed the restraining order. Nor was the evidence inadmissible under any theory that it was protected free speech. Such an expansive interpretation of the constitutional guarantee of free speech would make it impossible to enforce laws against conspiracies, solicitation and like offenses, and would render a court powerless to hear subjective evidence of intent. The questioned statement here was relevant to the issue of whether the disobedience of the restraining order had been wilful on the part of this defendant, and, in its context as relevant evidence, was not meant to be sheltered by the constitutional guarantees of free speech.

The judgment of the circuit court of Kankakee County was correct, and it is therefore affirmed.

Judgment affirmed.

COURT, U. S.

Supreme Court, U.S.
FILED
MAY 14 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1415

THE BOARD OF EDUCATION OF THE KANKAKEE SCHOOL DISTRICT NO. 111, A SPECIAL CHARTER DISTRICT, COUNTY OF KANKAKEE, STATE OF ILLINOIS,
Respondent,

vs.

KANKAKEE FEDERATION OF TEACHERS LOCAL NO. 886, HERBERT WHITE, LILLIE FORD AND PHILLIP RILEY, AS OFFICERS AND REPRESENTATIVES OF THE KANKAKEE FEDERATION OF TEACHERS LOCAL 886 AND HERBERT WHITE, LILLIE FORD, PHILLIP RILEY, JOHN KENNEDY, WILLIAM STEWARD, SR., STEVE BRECKON AND JAMES ROBINSON, INDIVIDUALLY,
Petitioners.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI.

The Respondent, the Board of Education of The Kankakee School District, No. 111, respectfully maintains that no new or undecided aspect of constitutional law is involved in this cause so as to entitle the Petitioners to the issuance by this Court of a writ of certiorari to the Supreme Court of Illinois to review its opinion and judgment in this cause.

ADDITIONAL QUESTION PRESENTED.

Assuming, *arguendo,* that the issuance of an order restraining a strike and picketing without notice is for any reason erroneous and subject to a motion to dissolve the injunction, are those restrained entitled under such circumstances to ignore the order?

CONSTITUTIONAL PROVISIONS AND STATUTES.

United States Constitution
Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Constitution of the State of Illinois.

Article VIII.

Section 1. Common school system provided.

The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.

ADDITIONAL STATEMENT OF FACTS.

On Monday, April 28, 1969, the schools remaining closed the Respondent filed its motion for preliminary injunction showing that it had filed its complaint for an injunction against the Petitioners, a temporary restraining order had been issued, and a writ of injunction served upon all parties defendant, which petition was filed pursuant to Illinois Revised Statutes, Chapter 69, Section 3-1. The motion requested the matter be set for hearing at the earliest possible time, and it was set for hearing May 2, 1969 at 9:30 A. M., at the same time as the hearing on the order to show cause entered April 29, 1969.

All parties in interest were served with notice of hearing on the preliminary injunction on April 28, 1969 and were served with the order to show cause and petition for rule on April 29, 1969. Service of summons was also made on all parties April 28, 1969

On May 2, 1969, hearing was had on the motion for preliminary injunction, at which all Petitioners were present in person and by counsel and at which time evidence was introduced pertaining to the existence of the strike, following which the preliminary injunction was ordered to issue on May 6, 1969.

The hearing on the rule to show cause was continued until May 5, 1969, at which time Respondent filed a motion to dismiss the proceedings in court and the rule to show cause, and the court having overruled the motion, took testimony offered by the Respondent and testimony offered by the Petitioners over a period of two days, during which all parties remained in open court. The court having ordered the preliminary injunction issued on May 6, 1969, followed this action with finding the defendant Union guilty of contempt on May 6, 1969, stating, in part, as follows:

"The Defendant Kankakee Federation of Teachers, Local No. 886, has, in the opinion of the Court, and the Court so finds, stood in hostile and open defiance of the lawful order of this Court.

It did not ask its attorney to come in with a motion to dissolve this injunction. It did not appeal from it. These are the—certainly the proper methods to challenge an order of the Court. If anyone thought it was wrong—and orders of the Court sometimes are erroneous—there is no question about that—there are proper, well known methods of correcting any such errors, but standing in open defiance before the public and before the Court of a legitimate lawful order of the Court can be nothing but a contempt of the Court."

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In order for Petitioners logically to rest their contention that a substantial Federal question is here involved on *Carroll* v. *President and Commissioners of Princess Anne,* 393 U. S. 175, 21 L. Ed. 2d 325, 89 S. Ct. 347, they must equate the form of expression protected by the First Amendment to the Constitution of the United States in *Carroll* with the form of expression commonly referred to as a strike.

Both are expressions, both are forms of communication, but there are differences which Petitioners seek to have this court, as they have all courts below, ignore. Freedom of speech as a concept, as did all of the concepts behind the First Amendment, rested on a recognition of a perhaps subtle, but certainly difficult, characteristic of human nature. Although we can conceive and lay out an organized society, and enjoy its benefits for a time, we soon become restive under what we consider a yoke if that society makes demands which cannot be related easily and clearly to our personal wants and well being.

Thus, the political concept which bottoms freedom of speech was the deeply felt necessity for guaranteeing the integrity and effectiveness of opposition and criticism, legitimately expressed, within the framework of the remainder of the Constitution. The contemplated subjects of opposition were policies, measures and figures, public in nature. Thus, the protection of the First Amendment does not extend to the encouragement of the commission of a crime. *Fox* v. *Washington,* 236 U. S. 273, 59 L. Ed. 573, 35 S. Ct. 383.

The thing which distinguishes a strike from the sort of expression protected by the First Amendment, is its coer-

cive nature on the one hand, and its objectives on the other.

The strike involved in this case did have one thing in common with the kind of expression contemplated by the First Amendment in that its objective was to change the policy of a public body, but it was coercive rather than persuasive.

Here there was no attempt to enlist the support of brother members of the public but rather a defiance, at the very inception, or threshold, of the affair, of the public interest as expressed in Article VIII of the Constitution of the State of Illinois and of the public policy of that State as alluded to in the opinion in this case in the Supreme Court of Illinois when it pointed out that under *Board of Education of Community Unit School District No. 2* v. *Redding* (1965), 32 Ill. 2d 567, a strike of public employees was against the public policy of the State.

This strike, as is the case with almost all others, arose from, and fed upon, the particular personal goals of the strikers and not upon any professed or actual publicly related interest. It is respectfully suggested that considerations of a nature similar to the foregoing led to the expression in *Cox* v. *Louisiana,* 379 U. S. 536, 555, 13 L. Ed. 2d 471, 484, 85 S. Ct. 453, as follows:

> "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech."

Conceding the general importance of notice, but not its effectiveness in this case, other than to permit another day or two or delay in reopening the district schools, the issue of its absence as a denial of due process is considerably muddied by the fact that a general appearance

on the temporary restraining order was entered, all defendants were generally present at all hearings, notice was given of the motion for preliminary injunction, hearing was set, extensive evidence was produced, and the court allowed the motion for preliminary injunction before the contempt order was entered.

The Petitioners do not explain why this waiver, consciously made, should be treated any differently than a waiver of trial by jury by a person criminally charged. *Patton* v. *United States,* 281 U. S. 276, 299, 74 L. Ed. 854, 863.

Furthermore, if there was prior restraint involved in this case, it was not created by the temporary restraining order itself, but by Article VIII of the Illinois Constitution and *Redding,* neither of which were at any time during the proceedings up to the date of the filing of the Petition herein, questioned or attacked by motion to dissolve the injunction, or otherwise. The presence of Article VIII and *Redding* formed the basis for the issuance of the restraining order in the first place, and the decisions of the courts below.

In addition, the Petitioners have preempted any First or Fourth Amendment issue by refusing to obey the restraining order. Before the Court can consider the element of notice, it must first dispose of the question posed by the fact that the contempt involved was for the disobedience of an order of court and not for conduct taking place before that order was issued.

It is at this point that the thrust of the First and Fourteenth Amendments collide with the thrust of the Preamble to the Constitution.

However meticulously the individual rights guaranteed by these amendments are protected, they will be of little practical substance if the power of the People of the United States to "establish justice" is so eroded in the process of

protecting individual rights that justice, once conceived, cannot be enforced.

As awesomely, and at times dubiously, regarded, as is the power of contempt by various elements of our society, Blackstone, in 4 Blackstone Comm. 286, observed:

> "The process of attachment for these and the like contempts must necessarily be as ancient as the laws themselves; for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme courts of justice, to suppress such contempts by an immediate attachment of the offender results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal."

The majority of the court in *Walker* v. *Birmingham,* 386 U. S. 307, 18 L. Ed. 2d 1210, 87 S. Ct. 1824, decided only four years ago, and in *Howat* v. *Kansas,* 258 U. S. 181, 66 L. Ed. 550, 42 S. Ct. 257, decided fifty years earlier, and relied upon in its decision by the Supreme Court of Illinois, tacitly, but firmly, upheld the logic of Blackstone's observation that laws without "authority to secure their administration from disobedience and contempt would be vain and nugatory".

The Court, in *Walker,* had before it the kind of circumstance envisioned by Blackstone, as does the Court in this case. In *Carroll,* relied upon by Petitioners, there was no element of disobedience of a court order. Thus, a majority of the Court in *Carroll* clearly distinguished the question there before it from the question presented in *Walker.* In *Carroll,* 393 U. S. 175, 179, 21 L. Ed. 325, 330, this Court made the following distinction between the two cases:

> "This conclusion—that the question is not moot and ought to be adjudicated by this Court—is particularly appropriate in view of this Court's decision in Walker v. Birmingham, 388 U. S. 307, 18 L. Ed. 1210, 87 S. Ct.

1824 (1967). In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity."

CONCLUSION.

There is no substantial question in this case which has not recently been decided.

In a society existing precariously in an age of increasing complexity, compounded by a growing impatience with the disciplines its complexities necessarily impose, the risk of error should fall upon the parties probing for weaknesses in published social disciplines rather than upon those charged with the maintenance of the integrity of an integral part of our strained social processes. It is submitted that this was the decision by this Court in *Walker,* and by the Supreme Court of Illinois in the case at bar.

We ask that the petition for the issuance of a writ of certiorari to review the decision of the Supreme Court of Illinois in this case be denied.

Respectfully submitted,

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